



## ANALYZING CONTOURS OF FREEDOM OF PRESS

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### **Introduction:-**

Freedom of press and restrictions which could be imposed on press has always been a volatile subject. Supreme Court in literally in every decade has tried to restrict this freedom by judicial pronouncement, by which they have tried tracing the contours of freedom of press. Recently, Supreme Court in *Sahara real estate v. Securities exchange board of india*<sup>1</sup> took a giant leap by developing the principle 'Postponement of Publication' by extending a 50 year old doctrine of 'Prior Restraint'. The Supreme Court is not only the guardian of the fundamental rights but also a balancing wheel between the rights. Freedom of expression is one of the most cherished values of a free democratic society. It includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. Freedom of expression is not an absolute principle under our Constitution. Further, it may also happen one right to freedom of expression may hinder another right like right to a fair trial. At present the system which is followed is the 'open justice system' which permits fair and accurate reports of court proceedings to be published except in cases of *in camera* proceedings. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings.

### **Freedom of press and Doctrine of prior restraint:-**

On the contrary, the concept of *Prior Restraint*, roughly speaking, deals with reasonable restrictions imposed upon speech or other forms of expression in advance of actual publication. Prior restraint is thus distinguished from subsequent punishment, which is a penalty imposed after the communication has been made as a punishment for having made it. Again speaking generally, a

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<sup>1</sup> I.A. Nos. 14 and 17 in C.A. No. 733 of 2012; 11<sup>th</sup> September 2012; Hereinafter referred as *Media guidelines case*



system of prior restraint would prevent communication from occurring at all and a system of subsequent punishment allows the communication but imposes a penalty after the event.<sup>2</sup> Of course, the deterrent effect of a later penalty may operate to prevent a communication from ever being made.<sup>3</sup> Nevertheless, for a variety of reasons, the impact upon freedom of expression may be quite different, depending upon whether the system of control is designed to block publication in advance or deter it by subsequent punishment.

Several features of the doctrine should be observed at the outset. In the first place, the doctrine deals with limitations of form rather than of substance.<sup>4</sup> The question to be determined is not that whether such restriction could be imposed on press, but it is whether there could be a strait jacketed formula for imposing such restrictions. The doctrine of prior restraint though has been developed by USA courts to restrict freedom of speech and expression which is an absolute right in United States. The said doctrine fits perfectly in the *US clash model*<sup>5</sup> but in India the freedom of speech and expression is not absolute. The major considerations underlying the doctrine of prior restraint, therefore, are matters of administration, techniques of enforcement, methods of operation, and their effect upon the basic values of Indian Constitution.

In *Virendrav. State of Punjab*<sup>6</sup>, Supreme Court upheld pre-censorship imposed for a limited period and right of representation to the government against such restraint under Punjab Special Powers (Press) Act, 1956. However, in the same judgment, another provision imposing pre-censorship but without providing for any time limit or right to represent against pre-censorship was struck down as unconstitutional. In the case of *K.A. Abbas v. Union of India*<sup>7</sup>, Supreme Court upheld prior restraint on exhibition of motion pictures subject to Government setting up a

<sup>2</sup>Thomas I. Emerson, "The Doctrine of Prior Restraint" (1955).648 *Faculty Scholarship Series*.Paper 2804 available at [www.digitalcommons.law.yale.edu/fsspapers/2804](http://www.digitalcommons.law.yale.edu/fsspapers/2804)(as visited on 10<sup>th</sup> Dec 2012 )

<sup>3</sup>*Ibid*

<sup>4</sup> Id at 649

<sup>5</sup> In United States the freedom of speech and expression is an absolute right which *ipso facto* includes freedom of press; in order to control the effect of this freedom the US courts have to evolve certain techniques or principles. This clash of absolute rights with judicial principle can be regarded as US clash model.

<sup>6</sup> AIR 1957 SC 896

<sup>7</sup> AIR 1971 SC 481



correctivemachinery and an independent Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

The question of prior restraint arose before Supreme Court in 1988, in the case of *Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay (P) Ltd.*<sup>8</sup> in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was *sub-judice* in Supreme Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be based on reasonable grounds for keeping the administration of justice unimpaired and that, there must be reasonable ground to believe that the *danger apprehended is real and imminent*. The Court went by the doctrine propounded by Justice Holmes of *clear and present danger*<sup>9</sup>. Supreme Court treated the said doctrine as the basis of *balance of convenience* test. Later on, the injunction was lifted after subscription to debentures had closed.

In the case of *Naresh Shridhar Mirajkar v. State of Maharashtra*<sup>10</sup>, Supreme Court dealt with the power of a court to conduct court proceedings *in camera* under its inherent powers and also to incidentally prohibited publication of the court proceedings or evidence of the cases outside the court by the media. It may be stated that open Justice is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. Supreme Court in the same case held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. Supreme Court held that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. Even in US in

<sup>8</sup> AIR 1989 SC 190

<sup>9</sup> John A. Gorfinkel and Julian W. Mack, *Dennis v. United States and the Clear and Present Danger Rule*, 39 Cal. L. Rev. 475 (1951)

<sup>10</sup> AIR 1967 SC 1

*Globe Newspaper Co. v. Superior Court*<sup>11</sup> the said principle of open justice may be given up for the said necessities of administration of justice.

Further, one has to understand that the power of contempt given to the court of record by virtue of Articles 129<sup>12</sup> and 215<sup>13</sup> of Indian constitution. The criminal contempt<sup>14</sup> mentioned in contempt of court Act 1971 has a definite parameter, but when it comes to 'Power to punish for contempt' under Articles 129 and 215 the power conferred upon these courts has a larger ambit. This can very well include power to take preventive action against a publication which may affect a person's right to fair trial or a possible contempt.

### **Doctrine of Postponement:-**

Thus, by virtue of Media guidelines case<sup>15</sup>

*"[A]ny person be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his rights under Article 21 to a fair trial. such a person would be entitled to approach an appropriate High court seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial including identity of the victim or the witness or the complainant, and that the court may grant such preventive relief, on a balancing of the right to a fair trial and Article 19(1)(a) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device*

<sup>11</sup> 457 US 596

<sup>12</sup> The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

<sup>13</sup> Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself.

<sup>14</sup> Sec 2(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) of any matter or the doing of any other act whatsoever which-

- (i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court; or
- (ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or
- (iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;

<sup>15</sup> *Supra* note 1 at pg. 51

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*(balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.”*

Law commission of India in its 200<sup>th</sup> report<sup>16</sup> on trial by media has also advocated for the ‘principle of postponement of publication’.

Whether the doctrine of postponement of publication in the form of restriction is justified under Article 19(2) of the Constitution of India? We must understand the nature of such orders of postponement. Publicity postponement orders should be seen, in the context of Article 19(1) (a) not being an absolute right. The *US clash model* based on collision between freedom of expression including free press and the right to a fair trial will not apply to Indian Constitution. In certain cases, even accused seeks publicity openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms.<sup>17</sup>

The test is that the publication must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial could nonetheless give rise to the real and substantial risk of serious prejudice to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt

### **Conclusion:-**

At last, one can say that though the doctrine is at a very nascent stage in the Indian scenario. It is a double edged sword which can at times be used by criminals who does have the capability to influence the witnesses or other evidences. The Apex Court by adopting this doctrine has actually taken a giant leap. Further, one has to admit that this is a welcome step taken by the court to stop Media Trial which at times definitely affect the administration of justice, but on the other side right to know or dissemination of information also need to be ensured. A complete disregard to these rights would simply undermine the Indian constitutional scheme. The Courts would have to very cautious in

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<sup>16</sup> See , [www.lawcommissionofindia.nic.in/reports/rep200.pdf](http://www.lawcommissionofindia.nic.in/reports/rep200.pdf) ( as visited on 10<sup>th</sup> dec 2012)

<sup>17</sup> Edward G. Hudon, *Freedom of the Press Versus Fair Trial: The Remedy Lies with the Courts*, 1 Val. U. L. Rev. 9 (1966)



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passing such orders. However, one thing is certain that the postponement order is *not a punitive measure, but a preventive measure*, and the effect of this change is highly depended upon the stability of law and not the stillness of law.